SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 306

INTERCO INCORPORATED,
Appellant

v.

ARNY RHODEN, CHAIRMAN OF THE
MISSISSIPPI STATE TAX COMMISSION,
Appellee

ON APPEAL FROM THE SUPREME COURT OF
MISSISSIPPI

# JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

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# JURISDICTIONAL STATEMENT.

This is an appeal by Interco Incorporated from the decision of the Supreme Court of Mississippi, rendered on March 17, 1969, affirming a judgment of the Circuit Court of Hinds County, Mississippi, which in turn had affirmed a decision of the Mississippi State Tax Commission that Appellant was liable for chain store taxes and penalties on its leased shoe depart-

ment operations in the State of Mississippi. The mandate of the Supreme Court of Mississippi was issued to the Circuit Court of Hinds County on May 14, 1969. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this direct appeal, that substantial constitutional questions are presented for resolution by the Supreme Court and that the court should exercise jurisdiction in this case.

## OPINIONS BELOW.

The Circuit Court of Hinds County delivered no written opinion or discussion of the case, other than the final judgment rendered by said court on March 25, 1968. The opinion of the Supreme Court of Mississippi is reported at 220 So 2d 290 (Miss., 1969). Copies of the opinion of the Supreme Court and the judgment of the Circuit Court of Hinds County are attached hereto as Appendix A.

## *JURISDICTION.*

Proceedings leading to this appeal were begun by suit being filed by Appellant in the Circuit Court of Hinds County, Mississippi, for recovery of chain store privilege taxes and penalties paid by Appellant to the Mississippi State Tax Commission pursuant to an Order of said Tax Commission dated March 14, 1967, as a result of a hearing held before said Commission. Appellant brought suit against the chairman of the Mississippi State Tax Commission for recovery of the said chain store privilege taxes and penalties in accordance with the provisions of §9307 of the Mississippi Code of 1942.

The judgment of the Circuit Court denied the relief sought by Appellant and dismissed Appellant's suit against the chairman of the Mississippi State Tax Commission, with the entry of that judgment being on March 25, 1968.

Appellant appealed to the Supreme Court of Mississippi, which, in a decision rendered on March 17, 1969, affirmed the judgment of the Circuit Court of Hinds County. The mandate of the Supreme Court was issued to the Circuit Court on May 14, 1969.

Appellant's Notice of Appeal to this court was filed in the Supreme Court of Mississippi on June 26, 1969, within the statutorily prescribed period.

The question involved in this appeal is the constitutionality, under the Fourteenth Amendment of the Federal Constitution, of a Mississippi statute, Laws of 1940, Ch. 121 (Mississippi Code of 1942, §9300 through §9311), which is commonly referred to as the Mississippi Chain Store Tax Act. The Mississippi Chain Store Tax Act imposes a privilege tax upon "chain stores" located in the State of Mississippi, with the taxation classifications varying according to the total number of stores in a "chain" both within and without the state. The Supreme Court of Mississippi expressly rejected a direct challenge to the statute's constitutionality, based on the Fourteenth Amendment. This Court therefore clearly has jurisdiction to review that decision by direct appeal under the provisions of 28 U.S.C. §1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme

Court to review the judgment on direct appeal in this case. Warren Trading Post Co. v. Arizona State Taxing Commission, 380 U.S. 685 (1965); Central R.R. of Pennsylvania v. Commonwealth of Pennsylvania, 370 U.S. 607 (1962); Standard Oil Company v. Peck, 342 U.S. 382 (1952).

## QUESTIONS PRESENTED.

The principle questions presented by this appeal are:

(1) Whether the Supreme Court of Mississippi erred in upholding the constitutionality, under the Fourteenth Amendment, of a Mississippi statute (§9300 - §9311 of the Mississippi Code of 1942) which is so vague, indefinite and arbitrary in its operation as to violate Appellant's constitutional guarantees of due process of law and equal protection of the laws.

(2) Whether the expansive interpretation of the Mississippi Chain Store Tax Act (§9300 - §9311 of the Mississippi Code of 1942) adopted by the Mississippi State Tax Commission and the Courts of Mississippi results in depriving Appellant of its property without due process of law and without equal protection of the laws guaranteed by the Fourteenth Amendment.

## STATUTES INVOLVED.

Mississippi Code of 1942, Title 37, Chapter 1, §9300 - §9311; Mississippi laws of 1940, Chapter 121; United States Constitution, Amendment XIV, §1.

Copies of the Mississippi Statutes involved are attached hereto as Appendix B.

## STATEMENT OF CASE.

### A. MATERIAL FACTS.

This appeal involves the validity of the Mississippi Chain Store Tax Act, which imposes a privilege tax upon "chain stores" located in the State of Mississippi, with the taxation classifications varying according to the total number of stores in the particular chain, both within and without the State.

Appellant is a diversified corporation engaged in the manufacture of shoes, shoe components and clothing; the wholesale and retail distribution of shoes; the wholesale and retail hardware business; and the operation of department stores. Appellant is a Delaware corporation authorized to do business in Mississippi and having its principal offices located in St. Louis, Missouri.

During the years in question in Mississippi, Appellant's business consisted primarily of the operation of leased shoe departments contained in stores owned and operated by other parties. The Mississippi State Tax Commission notified Appellant that its operations within the State of Mississippi subjected Appellant to the Mississippi Chain Store Tax Act and penalties provided thereunder, and that Appellant was subject to chain store taxation for each of its leased shoe department outlets in the State of Mississippi.

Appellant was notified of the position of the Mississippi State Tax Commission via a certified letter dated February 7, 1967, and signed by J. T. Sherman, Chief

of the Tobacco, Beer and Privilege Tax Division of the Tax Commission. The determination contained in that letter was contested by Appellant, and subsequently, a hearing was held by the Mississippi State Tax Commission on March 14, 1967, at which time an order of State Tax Commission affirming the determination of chain store taxes and penalties against Appellant was entered.

Appellant paid the chain store privilege taxes and penalties set forth in the Order of the Mississippi State Tax Commission dated March 14, 1967, relative to the operation of its leased shoe departments in the State of Mississippi, and under the provisions of §9307 of the Mississippi Code of 1942 Appellant filed suit against the Chairman of the State Tax Commission for recovery of the chain store privilege taxes and penalties erroneously and illegally collected from Appellant. Suit was filed for recovery of all chain store taxes and penalties relative to the leased shoe departments operated by Appellant. In the Declaration filed in the Circuit Court of Hinds County in this case Appellant charged that it is not a "retailer" as that term is defined in the Mississippi Chain Store Tax Act and is therefore not subject to the provisions of said Act; that said Act does not cover the leased shoe department operations of Appellant in the State of Mississippi; and that the imposition of the chain store privilege taxes and penalties against Appellant violated provisions of the Mississippi and United States Constitutions.

Upon the trial of the case in the Circuit Court, the facts were uncontroverted.

It was established that during the taxable years in question no less than 64 percent of Appellant's sales consisted of manufacturing and wholesale sales, and Appellant contended that these facts established that the principal business of Appellant is the manufacture and wholesale sale of shoes and men and boys' clothing, together with the operation of a wholesale hardware business. It was also established that during the taxable years in question Appellant operated from one to four retail shoe stores in the State of Mississippi plus seven to eight leased shoe departments operated within stores owned by others, and that these operations were the sole business activity conducted by Appellant in the State of Mississippi. All of Appellant's retail operations in the State of Mississippi were conducted under a wholly-owned subsidiary corporation, Senack Shoes of Mississippi, Inc.

Without expressing an opinion as to each of the various points raised by Appellant, the Circuit judge rendered judgment in favor of Appellee (Appendix A). Appellant appealed the decision of the Circuit Court to the Supreme Court of Mississippi and assigned as errors the failure of the trial court to find in its favor as to each of the legal propositions argued upon the trial of the case. The Supreme Court of Mississippi rejected each of the arguments made by Appellant and affirmed the decision of the trial court (Appendix A).

B. STAGE AT WHICH FEDERAL QUESTION WAS RAISED.

The Federal question was raised in the Declaration filed by Appellant in the Circuit Court of Hinds County, after the

State Tax Commission had rejected Appellant's arguments on the merits of the case at the hearing of March 14, 1967. In that Declaration Appellant contended that the chain store privilege tax sections of the Mississippi Code of 1942, §9300 - §9311, were unconstitutional as being in violation of the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Appellant also contended in its Declaration that an expansive interpretation of the Mississippi chain store tax sections so as to include its leased shoe departments within the State of Mississippi would result in the denial of due process of law and equal protection of the laws to Appellant guaranteed by the Fourteenth Amendment.

Among the errors assigned by Appellant on appeal of this case to the Supreme Court of Mississippi were those errors relative to the questioned constitutionality of the Chain Store Privilege Tax Act. The Federal constitutional question was briefed and argued in the Mississippi Supreme Court, which in its opinion discussed the constitutional questions presented and upheld the constitutionality of the statute in question (Appendix A, pages A8 - A9).

## THE QUESTIONS ARE SUBSTANTIAL.

Prior to this litigation there has been no adequate constitutional test of the Mississippi Chain Store Tax Act as passed by the Mississippi Legislature in 1940, Laws of 1940, Chapter 121. Constitutional issues were raised by Appellant in an earlier Mississippi Supreme Court case, Richards Lightman Theatres Corporation v. Stone, 201 Miss. 460 (1947), subsequent to the statute passed in 1940, but the Mississippi Supreme Court decided that case in favor of the taxpayer upon the merits and a resolution of the constitutional issues raised was not required.

The general issue of chain store taxation was last before the United States Supreme Court in the case of Great Atlantic and Pacific Tea Company v. Grosjean, 301 U.S. 412 (1937). In a four to three decision with two judges not participating - hardly an overwhelming decision - this court did uphold the general principle of chain store privilege taxation with taxation rates based upon a total number of stores in a chain, both within and without the taxing state. However, Appellant's constitutional attack on the Mississippi statute in question goes far beyond any prior case presented to this Court, and that constitutional attack was not adequately answered on brief by the Mississippi State Tax Commission nor in the opinion of the Mississippi Supreme Court rendered in this case.

No taxpayer could read the text of the statute involved here and determine whether or not leased departments were to be included under its coverage. No

regulations or rulings were issued by the Mississippi State Tax Commission to include leased departments under the coverage of the statute. The statue as written is vague, indefinite, and arbitrary in its operation and provides a fundamental lesson in confusion to taxpayers who might be affected thereby.

The Mississippi chain store tax sections are severely penal and criminal in their operation and, under the decisions of the Supreme Court of Mississippi should be strictly construed against the state and its taxing power. This rule was firmly established in the case of State of Mississippi, et al. v. Johnson, 238 Miss. 211 (1960), which contains an excellent enumeration of the Mississippi Supreme Court cases which stand for this proposition - that a taxing statute is to be strictly construed against the taxing power in the state. The court said in part:

> "It is a well-established rule that a taxing statute must be strictly construed against the taxing power and in favor of the taxpayer, and all doubts as to whether or not a tax has been imposed must be resolved in favor of the taxpayer. (Citations omitted.)"

As an example of the vague, indefinite and arbitrary nature of the chain store tax sections, §9305 of the Mississippi Code of 1942 provides in part that the penalties provided by the Act "may attach." However, the section goes on to provide that persons "shall be liable" for the amount of the tax involved and a 50 percent penalty thereon. In addi-

tion, the delinquent taxpayer "shall be guilty of a misdemeanor" and shall be subject to criminal penalties for that crime. The first paragraph of §9305 is not compatible with the remainder of that section dealing with penalties. Am. Jur. 2d enunciates the principles of Constitutional Law involved here as follows in Volume 16, Constitutional Law, Section 552:

> "It is a general principle of statutory law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ to its application violates the first essential of due process of law. . . . .
>
> * * *
>
> "The due process requirement of definiteness is especially important in its application to penal and criminal statutes. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain, understandable rule of conduct and know what acts it is his duty to avoid. The constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning."

It must be conceded that this statute is vague and indefinite as to exactly who is covered by its terms. While both severely criminal and penal, the sections purport to place unbridled control of the operation of this statute in the Chairman of the State Tax Commission without setting forth any standards or guidelines by which his conduct would be governed. Where an act punishable is a crime, then to vest absolutely unbridled power in administrative officers is a denial of due process of law. It is an attempt to grant a judicial power to an administrative officer, and that is the effect of the statute in question. Appellant's position is that the legislature has failed to prescribe any policy, standard or rule for the guidance of the Commissioner and has placed in him an arbitrary and uncontrolled discretion in the administration of this statute which results in a denial of due process of law to Appellant.

It is Appellant's position that the Mississippi Chain Store Tax Act has been vague, confusing, and indefinite at best, even to the State Tax Commission. In the first place, there is no statutory authority for the hearing conducted by the State Tax Commission on March 14, 1967, affirming the chain store privilege tax and penalty assessment against Appellant. Section 9304 of the Mississippi Code of 1942 places the administration of the Chain Store Privilege Tax Act in the Chairman of the State Tax Commission. Section 9307 spells out the appeal procedure by an aggrieved taxpayer, which in effect provides that the appeal from the decision of the Chairman of the State Tax Commission is to the courts, not to

the State Tax Commission. Appellant doubts seriously whether the State Tax Commission would have had any authority to rescind the assessment of chain store privilege taxes and penalties upon the hearing of March 14, 1967, since that hearing was without statutory authority.

In addition, the Chairman of the State Tax Commission failed to comply with the one absolute, mandatory provision of §9305 of the Mississippi Code of 1942, which provides for the issuance of one license for the chain store privilege tax and one license for the penalty imposed, and prescribes the endorsement on the license issued as a penalty. No such separate licenses were issued by the State Tax Commission on payment of these taxes and penalties, nor were the prescribed endorsements contained on the licenses issued.

In summary, it is the Appellant's position that the Mississippi Chain Store Tax Act deprives Appellant of the due process of law in the following respects:

1. The application of criminal and civil penalties by the statute calls for the strictest construction in favor of the taxpayer and against the State, and due process of law requires that all those subject to criminal statutes shall be apprised specifically of the conduct forbidden. The statute as a whole fails to meet that test.

2. The statute as a whole fails to provide for any notice whatsoever or opportunity to be heard prior to assesment of the taxes and penalties which

it provides and leaves the manner and procedure for the assessment of the taxes to the Chairman of the State Tax Commission without any standards, guides, or rules set forth, nor has the Chairman promulgated any regulations outlining such procedures for the benefit of the taxpaying public. The statute as a whole is so vague, indefinite and arbitrary in its operation and in placing uncontrolled and arbitrary discretion in the Chairman of the State Tax Commission that it violates the due process clause of the Fourteenth Amendment.

4. The collection of the chain store privilege taxes and penalties from Appellant pursuant to an Order of the State Tax Commission unauthorized by statute results in a denial of due process of law to Appellant.

It is also the Appellant's position that the Mississippi Chain Store Tax Act is violative of the equal protection clause of the Fourteenth Amendment.

As an example, §9303 contains a proviso which calls for lower chain store privilege tax rates in smaller municipalities as compared to the ordinary tax rates provided in that section. This very provision contravenes the declaration of policy set forth in §9300. Chain stores should be more harmful and more subject to suppression in smaller communities than in larger ones. There is no reasonable basis for this variation in classification. A similar sort of statute varying tax rates where stores were located in more than one county in Florida was declared unconstitutional by this Court as denying equal protection of the laws, Liggett

Company v. Lee, 288 U.S. 517 (1933). This Court said in part:

> ". . . . Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, cannot be justified by the assumption that a different classification for a wholly different purpose might be valid.
>
> "Those provisions of §5 which increase the tax if the owner's stores are located in more than one county, are unreasonable and arbitrary, and violate the guaranties of the Fourteenth Amendment."

Appellant's position is that there is no reasonable basis for the the lower tax rates graduated according to the size of the municipality found in §9303 in view of the fact that those lower rates are actually in opposition to the declaration of policy set forth in §9300.

In addition, a literal reading of the statute would require that the general class rates of the statute would apply to any store operated outside of a municipality, as opposed to the lower rates which would be required in smaller municipalities. This is a totally unreasonable and inconsistent rate differentiation which deprives Appellant of equal protection of the laws.

Certain states have amended their chain store tax statutes to provide for

taxation based upon the number of square feet of floor space occupied so as to encompass leased department and counter-type operations. This procedure might result in some sort of equality of treatment for leased department operations as compared to non-leased department operations of other taxpayers. For general taxation purposes, each department in a department store is not considered as a separate "store." Why should leased departments be treated any differently from the general taxation concept? This procedure denies to Appellant the equal protection of the laws.

Appellant submits that the attempted application of the chain store privilege tax sections to Appellant's leased department operations in Mississippi denies to it the equal protection of the laws in violation of the Fourteenth Amendment, in that non-leased departments are not treated as separate entities and subject to taxation as such, that the lower taxation rates provided in smaller municipalities are in contravention of the purposes of the Act itself, are inconsistent with the higher rates required for "stores" located outside of all municipalities and are in violation of the principles set forth by this Court in the case of Liggett Company v. Lee, supra.

The expansive interpretation of this statute attempted by the State Tax Commission and courts of Mississippi results in a denial of due process of law and equal protection of the laws to Appellant. In pursuing a definitional problem in a tax case, Malat v. Riddell, 383 U.S. 569 (1966), this Court said in part:

". . . the words of statutes - including revenue acts - should be interpreted where possible in their ordinary, everyday senses . . . : We hold that, as used in Section 1221(1), 'primarily' means 'of first importance' or 'principally'." (Emphasis added.)

In effect, the decision of the State Tax Commission and the courts of Mississippi read the requirement "principally in the business of making sales at retail" out of the statute, since it was conceded that no less than two/thirds of sales of Appellant were attributable to manufacturing and wholesale sales. In effect, the decision sets forth a double standard - determining the taxation rates based upon the number of "stores" in an organization as a whole throughout the United States and determining whether or not the entire organization is to be taxed based solely upon the type operations carried on in the State of Mississippi, even though the statute as written does not limit the test in this manner. This expansive treatment of the statute deprives Appellant of the constitutional guarantees contained in the Fourteenth Amendment.

The specific constitutional defects in the Mississippi Chain Store Tax Act were not appropriately answered on brief by the State Tax Commission, nor were these specific deficiencies covered in the opinion of the Supreme Court of Mississippi (Appendix A). These questions should be resolved, not only for taxpayers within the State of Mississippi but for the

benefit of all taxpayers within states which still maintain chain store taxation statutes.

In 1937, when the issue of chain store taxation was last before this court, there were twenty-two states which levied chain store taxes. The basic philosophy of those taxing statutes was founded in discrimination by an attempt to drive out of competition chain store operations by making those operations economically unfeasible. Chain store taxing statutes were spawned by the fears of the Great Depression, nurtured by the hopelessness which immediately followed that period of time, and bred at a rapidly ascending rate for a short number of years. As protection for small business has increased at both the local and federal level, the concept of discriminatory taxation to eliminate chain operations has become less and less palatable to the State Legislatures. Today, only twelve states still have some form of chain store privilege tax statute.

It is respectfully submitted that the constitutional questions presented here are substantial, that the decision of the Supreme Court of Mississippi is in contravention to the prior decisions of this Court as set forth herein and that this Court should note jurisdiction and require briefs on the merits of the

case and oral argument for resolution of the constitutional questions presented.

Respectfully submitted,

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# APPENDIX A

## OPINIONS BELOW

OPINION OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI. Unreported.

Decided March 25, 1968

This cause came on for hearing on the 15th day of November, 1967, and the parties and their attorneys were present, and the testimony of the witnesses, stipulation of facts entered into by the parties and all the evidence having been heard, the Court took the cause under advisement for decision and the entry of judgment at a later date and requested briefs which have been furnished by the parties.

The Court, after due consideration and a careful review of all the testimony, the stipulation of facts, all of the evidence and the briefs of the parties, is of the opinion and finds for the defendant, Dexter Barr, Chairman of the Mississippi State Tax Commission, and that the plaintiff, Interco Incorporated, is not entitled to judgment against the defendant, Dexter Barr, Chairman of the Mississippi State Tax Commission, in the sum of $16,237.50 or in any amount, and that this cause should be dismissed and all costs adjudged and assessed against the plaintiff, Interco Incorporated.

IT IS, THEREFORE, HEREBY ORDERED and ADJUDGED by the Court that the plaintiff, Interco Incorporated, take nothing of, from or against the defendant, Dexter Barr, Chairman of the Mississippi State Tax Commission and this cause is dismissed and all costs are adjudged and assessed against the plaintiff, Interco Incorporated, for which and all of which let execution issue.

ORDERED AND ADJUDGED on this the 25th day of March, 1968.

OPINION OF THE SUPREME COURT OF MISSISSIPPI. No. 45,205. Reported at 220 So. 2d 290, Miss. (1969)

Decided March 17, 1969;
Mandate Issued May 14, 1969

Interco, Inc. has appealed from an adverse final judgment of the circuit court of the First Judicial District of Hinds County dismissing its suit brought against appellee, Chairman of the Mississippi State Tax Commission.

Interco alleged that Mississippi State Tax Commission wrongfully had ordered and required it to pay $10,825.00 as chain store privilege taxes, plus $5,412.50 in penalties, under Mississippi Code 1942 Annotated sections 9100 through 9111 (1952), a total of $16,237.50 and sought recovery of that sum. By consent, the case was heard by the judge, without the intervention of a jury, and the facts, to the credit of appellant, were to a great extent stipulated by counsel for the respective parties.

Plaintiff-appellant, Interco, is a Delaware corporation, authorized to do business in Mississippi, with its principal office in St. Louis, Missouri. The defendant-appellee is the Chairman of the Mississippi State Tax Commission, who is charged with the duty of collecting "chain store" privilege taxes imposed by sections 9300 through 9311, supra. Interco operates through divisions and wholly owned subsidiary corporations.

It is the practice of Interco to lease shoe department space in department stores in cities throughout the country. It had in Mississippi 7 such leased "shoe department" retail outlets in each of the years 1963 through 1965, and had 8 such leased departments in 1966. In addition to these leased "shoe departments," Interco owned and operated in Mississippi 4 retail shoe stores in 1963, 1 in 1964 and 1 in each of the years 1965 and 1966. In all, Interco operated 119 retail shoe stores and leased retail shoe departments in 19 states, including Mississippi.

The initial formal demand upon Interco for payment of the $14,237.50 in chain store taxes and penalties was made by Mississippi State Tax Commission by letter on February 7, 1967. Prior to that time, "on previous occasions" since 1963, it was stipulated that the Commission had requested Interco to apply for and obtain chain store privilege licenses but Interco had declined or omitted to do so. The payment of the tax was made by Interco until $14,237.50 was paid April 28, 1967, pursuant to an order entered March 14, 1967, by the Mississippi State Tax Commission following a hearing of the matter.

On this appeal, Interco has assigned and argues several grounds for reversal.

First, it is contended that it is not a "retailer" as defined in Mississippi Code 1942 Annotated section 9301(c) (1952). It is pointed out that the tax is levied for "the privilege of engaging or continuing in the business of a retailer" as defined in the act; that "retailer" is defined by section 9301(c) as including "every person engaged principally in the business of making sales at retail." (Emphasis appellant's). It is argued that the key to including or excluding is the word "principally," and that Interco should be excluded because from 64% to 77% of its annual income in the years 1963 through 1966 was derived from its manufacturing and wholesale businesses.

A corporation or individual may, of course, engage in several businesses concurrently. The tax is levied for the privilege of operating retail outlets and is not affected by the fact that an entity so engaged may have income from other separate and different businesses as well. In such event, if considered solely upon the basis of income, the operator of the businesses might avoid the taxing of any one of them by showing in each case that the operator derived a greater proportion of income from a combination of the others. We think that the word "principally" as used in the act refers to the retail store or retail outlet for the operation of which the privilege tax is levied and was not intended to exempt those who engage in a retail business because such retailer also operates another business or other businesses from which he derives a greater proportion of income.

Appellant next contends that it was error to consider the "leased shoe departments" as being "stores" within the meaning of the chain store taxing statutes.

In the enactment of the "chain store tax statute the legislature declared its policy to be:

> It is hereby determined that due to the greater specialization in management and methods, the advantages of mass buying, of intensive selling, of greater utilization of capital assets, of the specialized character of their merchandizing and the more efficient coverage and results obtained from their advertising, stores operated in multiple units enjoy an advantage over individually owned and operated single stores to the extent that it is fit and proper that such stores should be separately classified for the purpose of privilege taxation; and further, that the increasing growth of chains and greater multiplication of units of stores tend to foster monopoly and to create unemployment by driving out of business their competitors who do not enjoy such advantages. Sec. Mississippi Code 1942 Annotated section 9400 (1956).

A lease form, customarily in use by Interco, was attached to the stipulation. This document shows that it was the practice of Interco to lease specifically defined floor space within an established department store and to use such leased space in conducting a retail shoe business. The lease provides for the utilization by Inter-

co of some of the facilities of the department store and requires Interco to maintain standards compatible with those of the department store in which it conducts its retail shoe business. Rental involves a profit sharing plan but the business of Interco in each case is unmistakably that of operating a retail shoe business.

The lease employed by Interco provides, among other things, that lessee shall occupy with its shoe department the space designated in the lease, and shall have the exclusive right in the store in which it is located to carry on and conduct the "business of selling at retail all types of footwear." Under the terms of the lease, it is agreed that, "while the business of lessee (Interco) is to be and remain as the business of lessee, the same shall be so conducted as to appear to customers to be a department of lessor's business." It is further provided that all persons employed in the shoe "department" shall be employees of lessee and that lessee shall be exclusively liable for all of its purchases of merchandise and equipment as well as for its other transactions connected with its retail shoe business.

The result of all of this is, beyond question, that the "leased department" is a retail outlet for shoes where Interco enjoys "the privilege of engaging or continuing in the business of a retailer." The legislative purpose in imposing the tax was to levy it upon the privilege of "engaging or continuing in the business of retailer." The character and extent of the quarters in which the business may be conducted is not germane to the question. Obviously it was the legislative intent that the tax apply whether the "business of a retailer" is conducted in a multistory

building entirely devoted to that purpose, in an apartment, a single room, or in a "shoe department" in a leased portion of a larger area. The fact that other floors, rooms or parts of rooms are used for other purposes cannot affect the proposition.

The word "store" is a word capable of expressing several different meanings, the meaning intended usually being determinable by the context in which it is used. In the statute under consideration we think it was used by the Legislature to mean "a place where merchandise of any kind is kept for sale." Funk & Wagnalls New Standard Dictionary Of The English Language (1935).

It is defined in the act itself as including "any mercantile establishment . . . in which goods, wares, or merchandise of any kind are sold or offered to be sold at retail." Mississippi Code 1942 Annotated section 9301 (1952).

Under these definitions and within reason, bearing in mind the purposes of the act and the nature of the levy, we have concluded that there can be no valid distinction between a retail shoe store operated in a separate "store" building, and such a retail store operated in a part of a building. See Calvert v. General Retail Corporation, 390 S.W. 2d 10 (1965) (application for writ of error refused by Texas Supreme Court), Hurt v. Cooper, 130 Tex. 433, 110 S.W. 2d 896 (1937).

The next contention of appellant, that the chain store taxing statutes unconstitutionally delegate "uncontrolled discretion" to the Chairman of the Mississippi State Tax Commission with respect to the

imposition of penalties, is also without merit. Broadhead v. Monaghan, 238 Miss. 167, 117 So. 2d 881 (1960) cited in support of this proposition, is not in point. In that case, the statute purported to delegate uncontrolled discretionary power to the Commissioner to impose penalties within broad limits as he saw fit. The provisions of Mississippi Code 1942 Annotated section 9305 (1952), under which the penalties were assessed in the present case, are definite, unequivocal and precise and leave no room for interpretation or for the exercise of discretion. The penalties are imposed for delinquency without regard to wilfulness or wantonness. No discretion rested with the Commissioner to waive, remit or vary the penalties in this case.

Finally, it is argued that the chain store taxing statutes are void because they violate the Mississippi and United States Constitutions. It is said that they violate "the concept of due process" and deny Interco "equal protection of the law."

Fox v. Standard Oil Co., 294 U.S. 87, 55 S. Ct. 333, 79 L. Ed. 780 (1935) (rehearing denied) 294 U.S. 723, 55 S. Ct. 511, 79 L. Ed. 1261 (1935) involved the validity of a chain store licensing statute of West Virginia and its application to distributing plants and service stations, the act levying the tax upon "all persons and corporations operating or maintaining a store as defined in the act." The West Virginia Act imposed a graduated tax of from $2.00 upon one store to $250.00 upon each store in a chain in excess of 75. The court held that gasoline service stations were "stores" within the meaning of the West Virginia Act and subject to the tax. The court answered in the negative conten-

tions similar to those now interposed by Interco to the effect that the act deprived the taxpayer of his property "without due process of law" and of "equal protection of the law."

Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, 112 A.L.R. 293 (1937), (rehearing denied) 302 U.S. 772, 58 S. Ct. 3, 82 L. Ed. 599 (1937) disposed of an attack upon the validity of the Louisiana Act of 1934 which provided for a graduated license tax upon operators of chain stores, based upon the number of stores included under the same general management "whether operated in this state or not." The tax varied from $10.00 for each store operated in Louisiana, where the chain had a total of not more than 10 stores, to a tax of $550.00 for each store in Louisiana belonging to a chain of more than 500 stores. The court held that the tax was not discriminatory nor did it deprive the taxpayer of his property without due process of law. The court distinguished Liggett Co. v. Lee, 288 U.S. 517, 53 S. Ct. 481, 73 L. Ed. 925, 85 A.L.R. 699 (1933), cited by Interco in support of its constitutional objections to the Mississippi statute, pointing out that in Liggett, where the tax was held invalid, the tax upon each store was increased if the chain had stores in two counties rather than in only one. In Liggitt the court said that the basis of the differentiation in rate of tax was entirely arbitrary, unrelated to the size or character of the chain and conditioned solely upon the location of one or more of its units.

Interco is a retailer operating a chain of stores within and without the state and

was properly assessed by Mississippi State Tax Commission with the chain store privilege license tax upon its Mississippi stores, including the leased departments, together with the penalties provided for delinquency.

The lower court did not err in holding that Interco was not entitled to recover in its action against appellee, and correctly dismissed the suit.

AFFIRMED.

# APPENDIX B

## TEXT OF STATUTES

## MISSISSIPPI CODE OF 1942, ANNOTATED
## TITLE 37, CHAPTER 1
## SECTIONS 9300 THRU 9311

### Mississippi Laws of 1940, Chapter 121

§9300. Declaration of policy.--It is hereby determined that due to the greater specialization in management and methods, the advantages of mass buying, of intensive selling, of greater utilization of capital assets, of the specialized character of their merchandising and the more efficient coverage and results obtained from their advertising, stores operated in multiple units enjoy an advantage over individually owned and operated single stores to the extent that it is fit and proper that such stores should be separately classified for the purpose of privilege taxation; and further, that the increasing growth of chains and greater multiplication of units of stores tend to foster monopoly and to create unemployment by driving out of business their competitors who do not enjoy such advantages.

§9301. Definitions.--The following words, terms, and phrases when used in this act have the meaning ascribed to them in this section except where the context clearly indicates a different meaning.

(a) "Person" includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver syndicate, ficuciary, or any other group or combination acting as a unit, and the plural as well as the singular number engaged in the business of operating or maintaining, as a part of a chain or group, any store or stores in this state, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail.

(b) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(c) "Retailer" includes every person engaged principally in the business of making sales at retail and maintaining or operating, as part of a group or chain, any store or stores within this state.

(d) The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments, belonging to a group or chain of stores, which are owned, operated, maintained or controlled directly or indirectly by the same person, firm, corporation, co-partnership or association, either domestic or foreign in which goods, wares or merchandise of any kind are sold or offered to be sold at retail.

Provided, however, that the term "store" as used in this act shall not be construed to mean or include any place of business at which the principal business conducted is that of selling, storing or distributing gasoline and other petroleum products; and provided, further, that utilities which maintain stores or show rooms, in connection with their several offices or places

of business, for the disposal of gas and electric appliances and equipment which said stores or show rooms tend to promote the convenience of the public, are likewise exempted.

(e) A "group", "group of stores", "chain", "chain of stores", or "chain stores" as used in this act shall mean a group of three or more stores as hereinabove defined, one or more of which is located whthin this state under the same general management, supervision, control or ownership, whether such ownership, management, supervision or control is direct or indirect, and whether mediate or immediate or is accomplished through stock-ownership in one or more corporations, trusteeship, or by any device whatsoever, the essential test being that such group of stores is ultimately controlled or directed by one management or association of ultimate management.

(f) "Chairman" means the chairman of the state tax commission when used in this act.

§9302. Application for license.-- Every person engaged in business subject to tax by this act shall file with the chairman an application for a privilege license as hereinafter provided. The application shall be made upon forms prescribed by the chairman, and shall set forth the name under which the applicant transacts his business; the location of his place or places of business; the maximum number of stores operated in the state of Mississippi; the maximum number of stores operated in the entire chain during the year for which the application for privilege license is made, and such other information as the chairman may require.

The application shall be signed by the owner, if a natural person, and if an association or partnership, by a member or partner thereof, and if a corporation, by an executive officer thereof, or some person specifically authorized by the corporation to sign the application, and said application shall be filed with the tax shown to be due with the chairman within thirty (30) days after the close of each calendar year for which the tax is due.

§9303. Tax.--There is hereby levied to be collected and paid as hereinafter provided, an annual privilege tax for the privilege of engaging or continuing in the business of a retailer as defined in this act, upon every individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver syndicate, fiduciary, or any other group or combination acting as a unit, when operating or maintaining any store or stores in this state as part of a group or chain; said tax to be equal to the amount determined to be due as hereinbelow set out, and to be based upon the maximum number of stores operated during the year for which the privilege tax is due.

Class 1. Upon stores operated in this state and belonging to a chain or group having a total of not more than five stores, the flat sum of ten dollars ($10.00) for each such store operated in this state.

Class 2. Upon stores operated in this state and belonging to a chain or group having a total of more than five stores, but not more than ten stores, the flat sum of twenty-five dollars ($25.00) for each such store operated in this state.

Class 3. Upon stores operated in this state and belonging to a chain or group

having a total of more than ten stores, but not more than fifty stores, the flat sum of fifty dollars ($50.00) for each such store operated in this state.

Class 4. Upon stores operated in this state and belonging to a chain or group having a total of more than fifty stores, but not more than one hundred stores, the flat sum of one hundred dollars ($100.00) for each such store operated in this state.

Class 5. Upon stores operated in this state and belonging to a chain or group having a total of more than one hundred stores, but not more than two hundred and fifty stores, the flat sum of two hundred dollars ($200.00) for each such store operated in this state.

Class 6. Upon stores operated in this state and belonging to a chain or group having a total of more than two hundred and fifty stores, the flat sum of three hundred dollars ($300.00) for each such store operated in this state.

Provided, however, that for stores identified as "chain stores," under the terms and definitions of this act, the privilege tax for any store operated in a municipality having a population of less than three thousand (3,000) inhabitants shall be three-fifths (3/5) of the amount which would otherwise be required under the terms of this act; provided, further, that for stores identified as "chain stores," under the terms and definitions of this act, the privilege tax for any store operated in a municipality having a population of more than three thousand (3,000) inhabitants, but less than six thousand (6,000) inhabitants, shall be four-fifths (4/5) of the amount which would otherwise be required under the terms of this act.

§9304. Administration.--The administration of this act and the collection of tax herein levied, imposed and required to be paid are hereby vested in the chairman of the state tax commission, and the chairman is authorized to make, promulgate and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this act as may be deemed expedient.

§9305. Tax, when due.--The taxes levied and imposed by section 4 [§9303, supra] of this act shall be due and payable on the first day of January, 1941, and each succeeding year thereafter, at which time the chairman shall issue a license, after ascertaining from the applicant therefor the facts with reference to the maximum number of stores owned or controlled by said applicant during the year for which the tax is paid. Provided, however, that a period of thirty (30) days' grace after January 1st of each year may be allowed for the payment of the tax imposed by section 4 [§9303, supra]. If the tax be not paid within the grace period herein specified, it shall be delinquent and the penalties provided by this act may attach. All taxes provided for herein are due and payable at the office of the chairman of the state tax commission in Jackson, Mississippi.

No credit shall be allowed for any store or stores opened, established, operated or maintained within any calendar year for the proportionate part of the year such store or stores were not opened, established, operated or maintained, nor shall any refund be allowed for the discontinuance of any store or stores within any calendar year for the proportionate part of the year remaining thereafter.

All persons liable for the privilege tax herein imposed who shall fail to procure the license therefor on January 1st of each year, or during the period of grace herein specified, shall be liable for the amount of the tax required, and fifty per centum (50%) thereof as penalty, and it shall be the duty of the chairman to collect the said tax and penalty, and issue a separate license for the tax and for the penalty, and endorse across the face of the license issued as a penalty, the words: "Collected as damages;" and he shall account for all such penalties as he is required to account for the taxes collected hereunder.

In addition to the penalty hereby prescribed, the delinquent taxpayer shall be guilty of a misdemeanor, and subject to penalties therefor as prescribed by law.

§9306. Warrant for collection of tax.--If any person, firm, partnership, corporation or association of persons subject to the provisions of this act, or any rules or regulations promulgated by the chairman under authority hereof, shall violate any of the provisions of this act, or any rules or regulations promulgated by the chairman in the administration of this act, or fail to pay the tax and penalties imposed herein, and found to be due and not paid on demand, the chairman shall forthwith issue a warrant under official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person owing the tax found within his county, for the payment of the amount thereof, with

added damages, penalties, interest and cost of entering and executing the warrant, and to return such warrant to the chairman, and pay to him the money collected by virtue thereof, by a time to be therein specified, not more than sixty (60) days from the date of the warrant.

The sheriff shall, within five (5) days after receipt of the warrant, file with the circuit clerk of his county a copy thereof, and thereupon the circuit clerk shall enter in the judgment roll, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns, the amount of the tax, or portion thereof, and damages, for which the warrant is issued, and the date when such copy is filed; and thereupon the amount of such warrant, or warrants so docketed shall become a lien upon the title to and interest in the real and personal property, including choses in action of the person against whom it is issued, in the same manner as a judgment duly enrolled in the office of such clerk. The sheriff thereupon shall proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgment or attachment proceedings of a court of record; and shall be entitled to the same fee for his service in executing the warrant as now allowed by law for like service, to be collected in the same manner as provided by law for like service.

§9307. Appeal by taxpayer.--If the taxpayer be aggrieved at the findings of the chairman, and has paid the tax, penalties and interest assessed against him,

he may recover the amount wrongfully paid, together with interest, in any proper action or suit against the chairman in the circuit court of Hinds county, Mississippi, which shall have original jurisdiction of any action to recover any tax, penalty or interest improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax, penalty or interest, or to make any demand to have the same refunded, in order to maintain such suit. In any suit to recover taxes, penalties or interest paid, the court shall adjudge cost to such extent and in such manner as may be deemed equitable.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or any part of them, due from any person, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this state, or that the same was fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person. In the latter case, no such injunction shall be awarded unless application shall first have been made to the chairman to collect the alleged mistake, and the chairman shall have refused to do so, which fact shall be stated in the bill; or unless the complainant shall have paid to the chairman all taxes appearing by the bill of complaint to be owing.

§9308. Chairman to remit collections. --All taxes collected by the chairman under the provisions of this act shall be paid into the general fund of the state treasury, as provided by law, on or before the 1st and 15th day of each month, and the chair-

man shall keep a full and accurate record of all monies received by him, and how disbursed.

§9309. Repealer.--That chapter 55, laws of 1938, extraordinary session, and chapter 157, laws of 1936, be and the same are hereby repealed, provided that this section shall not be effective in the event that section 4 [§9303, supra] of this act should be invalid.

§9310. Other licenses.--The tax imposed by this act shall be in addition to and shall not repeal any other license tax, occupational tax, excise tax, or tax levied by law for engaging in business in the state of Mississippi, unless expressly repealed hereby.

No municipality or levee district shall impose a special privilege tax on "chain stores" under the terms of this act.

§9311. Saving clause.--If any section, subsection, sentence, clause, phrase or word of this act for any reason is held or declared to be unconstitutional, inoperative or void, such holding or invaldity shall not affect the remaining portions of this act; and it shall be construed to have been the legislative intent to pass this act without such unconstitutional, inoperative or invalid part therein; and the remainder of this act, after the exclusion of such part or parts, shall be deemed and held to be valid as if such excluded parts had not been included herein; or if this act, or any provision thereof, shall be held inapplicable to any person, groups of persons, property, kind of property, circumstances or set of circumstances, such holding shall not affect the applicability thereof to any other person, property or circumstances.

APPENDIX C

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COPY OF JUDGMENT AND MANDATE
APPEALED FROM

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STATE OF MISSISSIPPI

To the Honorable the Circuit Court, of Hinds County -- Greetings:

WHEREAS, on the 17th day of March, 1969 (the same being a day of the regular term of our SUPREME COURT, begun and held in the Court room, in the Capitol, in the City of Jackson, in said State on the 1st Monday of March, in the year of our Lord, 1969, the following final judgment was rendered by our SUPREME COURT; to-wit:

Interco, Inc.

No. 45,205 vs.

Arney Rhoden, Chairman of the Mississippi State Tax Commission

This cause having been submitted at a former Term of this Court on the record herein from the Circuit Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 25th day of March 1968 be and the same is hereby affirmed. It is further ordered and adjudged that the appellee do have and

recover of and from the appellant and United States Fidelity & Guaranty Company, surety on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

YOU ARE THEREFORE HEREBY COMMANDED, That such execution and further proceedings be had in said cause, as according to right and justice, and the judgement of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. W. N. Ethridge, Jr., Chief Justice of our Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, at Jackson, this the 14th day of May, A.D., 1969.

PROOF OF SERVICE

I, James Leon Young, one of the attorneys for Interco Incorporated, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of June, 1969, I served a copy of the foregoing Jurisdictional Statement on the Appellee thereto, as follows:

1. On Arny Rhoden, Chairman of the Mississippi State Tax Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Taylor Carlisle, Esq., Attorney for the Mississippi State Tax Commission, at the office of the Mississippi State Tax Commission, Woolfolk Building, Jackson, Mississippi.

James Leon Young
Attorney for Appellant
930 Deposit Guaranty Bank Building
Jackson, Mississippi